IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3188 of 2002

HON'BLE MR.JUSTICE K.S.JHAVERI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PJ PATEL

Versus

STATE OF GUJARAT

Appearance:

MR PARESH UPADHYAY for Petitioner No. 1

MR K.P. RAWAL, AGPfor Respondent No. 1-2

MR SK PATEL for Respondent No. 3

RULE SERVED BY DS for Respondent No. 4-5

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 23/07/2004

ORAL JUDGEMENT

1.0 By way of this petition the petitioner has challenged the action of the respondent whereby the respondent nos.4 and 5 are treated to be seniors to the petitioner vide communication dated 9th October 2001 in spite of the fact that the petitioner was senior while

they were granted ad hoc promotion on 11th December 1998.

2.0 The petitioner was appointed as a direct recruit Executive Engineer in the Roads & Building Department of Government of Gujarat. Seniority list was published from time to time and the name of the petitioner was placed at the appropriate place. Shri M.B. Bhalala and Shri J.J. Shiyani, respondent nos.4 and 5 herein, who are also direct recruits, were junior to the petitioner and were shown as such in the seniority list.

2.1 The petitioner and Shri Bhalala were promoted as Superintending Engineer vide order dated 31.7.1992. Shri Shiyani was promoted as Superintending Engineer on 31.5.1993. Thereafter the said three persons were promoted as Chief Engineer and their names were properly shown in the order and the name of the petitioner was above the names of respondent nos.4 and 5. The said promotion was temporary subject to the approval by the Gujarat Public Service Commission. Thereafter the Government passed an order dated 5.8.2000 regularising the promotion of the petitioner as well as the promotion of the persons promoted along with the petitioner vide order dated 11.12.1998 from their initial date of promotion i.e. from 11.12.1998. In the said order the name of the petitioner was shown below the names of Shri Bhalala and Shri Shiyani.

2.2 The petitioner, therefore, made a representation dated 16.10.2000 which came to be rejected by communication dated 9.10.2001 (Annexure-E). In the said order it was communicated to the petitioner to the effect that the name of the petitioner is rightly shown below the names of Shri Bhalala and Shri Shiyani. Thereafter the authorities have issued provisional seniority list for the cadre of Chief Engineer on 27.12.2001 wherein the name of the petitioner is shown at serial no.55 which is below his juniors i.e. Shri Bhalala and Shri Shiyani. The petitioner vide his communication dated 21.1.2002 filed his objection to the seniority list. However, in view of the decision of the Government dated 9th October 2001 (Annexure-E referred above) the petitioner has filed the present petition.

3.0 Though the respondent nos.4 and 5 were served, none appeared on their behalf.

4.0 Mr. Upadhyay for the petitioner submitted that the authorities have wrongly taken into consideration the order of censure and preliminary inquiry, against the petitioner for considering him junior to Shri Bhalala and

Shri Shiyani. According to him, the two departmental inquiries referred to by the authorities were concluded in favour of the petitioner. In one departmental inquiry the Government has given censure. However, he submitted that it is the policy of the Government (Government Resolution dated 18.3.1998 - Annexure-I) that not only the censure, but even punishment of withholding of increment is also not to be considered as a factor against the concerned officer in the matter of promotion. Therefore, the respondents ought not to have taken the said fact in the matter of seniority on the promotional post. It was also pointed out that the preliminary inquiry pending against the petitioner was dropped by the Government and the same was communicated to him vide letter dated 20.12.2001.

4.1 In the affidavit in reply filed by the respondent it is stated that in consultation with Gujarat Public Service Commission the Government had decided to categorise the petitioner, Shri M.B. Bhalala and Shri J.J. Shiyani as "Very good". However, it is submitted that the petitioner who is senior amongst these three officers, had been awarded the penalty of "censure" in one departmental inquiry and one chapter of preliminary inquiry was pending at that time. Considering this fact it was decided to place the petitioner at rank no.3 in the select list.

5.0 Along with the affidavit-in-rejoinder the petitioner has produced Government Resolution dated 23rd September 1981, the title of which clearly goes to show that the said resolution deals with the procedure to be followed by Departmental Promotion Committee (DPC) in the case of government servants against whom inquiries are pending or to be initiated or who are under suspension. It is pointed that the case of the petitioner does not fall in any of the contingencies mentioned in the said Resolution and therefore the said Resolution will not have any applicability in the facts this case. Not only that as already referred to hereinabove, the learned Advocate for the petitioner has also placed reliance on the government Resolution dated 18th March 1998 wherein it is clearly stated that a censure or warning need not be taken into account while considering his case for promotion.

6.0 In the present case the censure order was passed in 1996, whereas adhoc promotion was granted on 11th December 1998. Therefore, while granting ad hoc promotion the censure was not taken into consideration. Under the circumstances, at the time of confirmation the

stand taken by the government was not in consonance with their earlier action.

6.1 In any case, the petitioner was senior to respondent nos.4 and 5 while granting promotion as Chief Engineer and was senior to them in the feeder cadres as well. The service record of the petitioner is classified as "Very good" as is done in case of respondent nos.4 and 5. The only factor against the petitioner which was taken into consideration by the respondent is the "censure" which could not have been taken into consideration in view of the aforesaid Government Resolution dated 18th March 1998.

6.2 In any case, when the respondent has granted promotion to the petitioner along with others and placed him senior to respondent nos.4 and 5 in the year 1998 i.e. after the order of censure, there was no reason for the respondent to place him below the respondent nos.4 and 5. Therefore, the decision as communicated vide communication dated 9.10.2001 is illegal and bad in law.

7.0 For the foregoing reasons, the petition is allowed. The impugned decision of the respondent authorities of treating the petitioner junior to respondent nos.4 and 5 in the cadre of Chief Engineer, as communicated vide letter dated 9th October 2001 (Annexure-E) is quashed and set aside. The order dated 5th August 2000 shall be modified and the respondent authority shall treat the petitioner as senior to respondent nos.4 and 5 herein, in the cadre of Chief Engineer and shall accordingly show his name in the seniority list of the cadre of Chief Engineer. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]
ar